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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 244 **244**

LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND
EX-OFFICIO CITY TREASURER OF THE CITY OF NEW ORLEANS,
ET AL., *Appellants*,
v.s.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY AND UNION
BARGE LINE CORPORATION

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATEMENT AS TO JURISDICTION

BOLIVAR E. KEMP,

Attorney General of Louisiana;

CARROLL BUCK,

First Assistant Attorney General;

HENRY G. McCALL,

City Attorney for the City of New Orleans;

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Special Counsel,

Counsel for Appellants.

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ET AL.,

Appellants,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
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FOR THE FIFTH CIRCUIT

STATEMENT AS TO JURISDICTION

Now comes Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, Louisiana, and George Montgomery, State Tax Collector for the Parish of Orleans, State of Louisiana, in their respective official capacities, appellants herein, and concurrently with the presentation of their petition for the allowance of an appeal from the United States Circuit Court of

Appeals for the Fifth Circuit to the Supreme Court of the United States, herewith and hereby present this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon such appeal to review the decrees from which said appeal is taken.

The above named appellants in support of the jurisdiction of the Supreme Court of the United States to review on appeal the above entered nine causes and the decrees of the United States Circuit Court of Appeals, Fifth Circuit, holding the assessment and collection of the taxes by appellants in these nine causes to be illegal and invalid, respectfully represent:

No. 1. Statute Sustaining Jurisdiction

The statutory provision believed to sustain jurisdiction, is Judicial Code Section 240, as amended (title 28 U. S. C. A. Section 347 (b)), and particularly the following provisions thereof:

(b) "Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case."

No. 2. The Louisiana Statute, Provisions of Which Have Been Nullified and In Effect Held To Be Violative of the Due Process Clause of the 14th Amendment of the Constitution of the United States

The Statute of the Legislature of the State of Louisiana, whose provisions, in effect, have been held to violate the due process of law clause of the Constitution of the United States, is Act 59 of 1944 (Dart's Louisiana General Statutes, Vol. 6, Section 8370) and particularly certain provisions of this statute, reading as follows:

(a) * * *

"Movable personal property"—All movable and regularly moved locomotives, cars, vehicles, craft, barges, boats and similar things, which have not the character of immovables by their nature or by the disposition of law, either owned or leased for a definite and specific term stated and operated (such, illustratively, but not exclusively, as the engines, cars and all rolling stocks of railroads; the boats, barges and other water-craft and floating equipment of water transportation lines); but not including "other personal property," as hereinafter defined and expressly excluding the cars and rolling stock of sleeping car and express lines and all similar property and the rolling stock operated upon a per diem basis and such motor vehicles as are exempted by law from such taxation and the cars of private transportation and tank car lines, the valuation and assessment of which are covered and provided for by other laws.

(f) The "movable personal property" of such persons, firms, or corporations, whose line, route, or system is partly within this state and partly within another state or states, shall be by the commission valued for the purposes of taxation and by it assessed; and such assessment by it fairly divided, allocated and certified

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to each such parish and municipality as herein defined, within this state, within, through or under which same be operated; said division, allocation and certification to be determined in the following manner and according to the following method, such assessment to be there subject to all state taxes and to all parish taxes and to all municipal taxes, as same are herein defined and to none other.

1. The portion of all of such property, of such person, firm or corporation shall be assessed in the state of Louisiana, wheresoever, in the ratio which the number of miles of the line, within the state bears to the total number of miles of the entire line, route or system, here and elsewhere, over which such movable personal property is so operated or so used by such person, firm or corporation.

5.

(g) For the purposes of such valuation, assessment and taxation in Louisiana such parishes and municipalities shall be hereby and declared, respectively, *to be a taxable situs in this state* of such movable personal property, whether same be operated entirely within or partly within and partly without this state and whether said tax-payer be a *resident or a non-resident* of Louisiana and *irrespective of whether or not here domiciled locally or otherwise.* (Italics ours.)

No. 3. Date of Decrees and Application for Appeal

Decrees of theforesaid United States Circuit Court of Appeals holding the collection of these *ad valorem* taxes on the tow-boats and barges of the respondent barge line Companies, to be illegal and invalid were entered as of March 5th, 1948, rehearing denied April 13, 1948, the application for appeal herein is presented July 9th, 1948.

No. 4 Nature of the Cases, the Rulings of the Court and Substantial Questions Involved

The above nine cases were consolidated for trial and involve the assessment and collection by appellants herein of *ad valorem* taxes against the tow boats and barges of the three respondent barge line Companies in the ratio of the number of miles of their lines within Louisiana bears to the total number of miles of their entire lines, in accordance with the Louisiana Statute.

The respondent barge line Companies filed suit for the recovery of these taxes paid under protest, the District Court holding that the water craft of these three barge lines had no taxing situs in Louisiana, and decreeing the retention of these taxes by appellants to violate the due process of law clause of the 14th Amendment of the Constitution of the United States; the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court in these nine cases. This holding by the District Court and affirmed by the Circuit Court of Appeals, is in direct conflict with Section 5 (g) of the Louisiana Statute (Act 59 of 1944), which specifically fixes the taxable situs of the portion sought to be taxed to be in the Parish or municipality where these barge lines operate within Louisiana, regardless of whether these Companies be a *resident* or *nonresident* of Louisiana and irrespective of whether or not domiciled in Louisiana or otherwise.

The question involved here is whether or not a taxable situs of these interstate carriers should be an issue when the Louisiana Statute specifically provides for the collection of a portion of these taxes, regardless of the residence or domicile of the barge line Companies.

In spite of the fact that the only condition precedent to allow Louisiana and the City of New Orleans the right to a proportion of these taxes under the State Statute, is the

fact that the lines of these Companies run partly within Louisiana (which is of course admitted) the District Court and the Circuit Court of Appeals have gone into the question of the situs of this watercraft, and in not allowing New Orleans and Louisiana the right to these taxes under the clear wording of the State Statute have in effect declared these provisions of this Statute of the State of Louisiana repugnant to the Constitution of the United States, which is the Federal question presented here.

Act 59 of 1944 of the Legislature of Louisiana contains no proviso that a taxing situs must first be found in Louisiana for these interstate carriers, but the Statute actually makes the parish or municipality in Louisiana in which they operate the taxable situs for the portion sought to be taxed.

The holding by the District Court and the Circuit Court of Appeals therefore in effect decrees this Statute repugnant to the Constitution of the United States and calls for an *appeal of right* under the above cited Section of the Judicial Code of the United States.

The Federal question involved here is substantial as it affects the very life of the Louisiana Statute, and will be determinative of many other pending cases.

The appellants append hereto a copy of the opinion of the United States District Court delivered in these cases, together with the Court's findings of fact and conclusions of Law; the appellants also append hereto a copy of the opinion

of the United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BOLIVAR E. KEMP,

Attorney General for the State of Louisiana;

CARROLL BUCK,

First Assistant Attorney General;

HENRY G. McCALL,

City Attorney for the City of New Orleans;

HENRY B. CURTIS,

First Assistant City Attorney;

ALDEN W. MULLER,

Assistant City Attorney;

HOWARD W. LENFANT,

Special Counsel.

APPENDIX "A"

[fol. 149.] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 28, 1948

No. 12116

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 149a] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 28, 1948

No. 12124

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 150] OPINION OF THE COURT—Filed March 5, 1948

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH
CIRCUIT

No. 12116

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

DEBARDELEBEN COAL CORPORATION, Appellee

No. 12117

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12118

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12119

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

AMERICAN BARGE LINE COMPANY, Appellee

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[fol. 151]

No. 12120

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,
versus

AMERICAN BARGE LINE COMPANY, Appellee

No. 12121

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

AMERICAN BARGE LINE COMPANY, Appellee

No. 12122

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12123

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

UNION BARGE LINE CORPORATION, Appellee

No. 12124

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

DEBARDELEBEN COAL CORPORATION, Appellee

[fol. 152]

No. 12125

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12126

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

versus

AMERICAN BARGE LINE COMPANY, Appellee

Appeals from the District Court of the United States for
the Eastern District of Louisiana

(March 5, 1948)

Before Hutcheson, McCord, and Lee, Circuit Judges
LEE, Circuit Judge:

These suits were brought by appellees for the return of *ad valorem* taxes assessed and collected by the City of New Orleans and the State of Louisiana. They were consolidated for the purpose of trial as they are for the purpose of appeal.¹

[fol. 153] The four appellees, Mississippi Valley Barge Line Co. (hereinafter called "Mississippi"), American Barge Line Co. ("American"), Union Barge Line Corporation ("Union"), and DeBardeleben Coal Corporation ("DeBardeleben"), as their names imply, operate barge lines. Mississippi, American, and DeBardeleben sued for return of taxes collected for the years 1944 and 1945, while

¹ The taxes were paid under protest under the terms of Act 330 of 1938, which provides that in case any taxpayer resists the payment of the amount assessed against him or the enforcement of any provision of law in relation thereto, the amount shall be paid by the taxpayer but kept segregated; a right of action is given the taxpayer to contest in any State or federal court having jurisdiction the invalidity he insists upon, and, if he prevail, the taxes paid shall be returned with interest.

Union sued for return of taxes collected for the year 1945.² The taxes were levied under assessments made by the Louisiana Tax Commission under Act 152 of 1932, as amended by Act 59 of 1944, on the proportion of appellees' lines in Louisiana as compared to their entire systems. Appellees' petitions all follow the same general trend, that the tax is unconstitutional because it is a burden upon interstate commerce, because it violates the due-process clause of the State and federal Constitutions, and further that the assessments were arbitrary and capricious. Appellants contend that the taxes were constitutional and proper, and further that the question of assessments, that is, the method of making them and the amount thereof, is not now before the court, since appellees did not avail themselves of the administrative remedies given them by the Louisiana law. The trial below resulted in judgments for each of the appellees, ordering the return of the taxes paid, the court holding that in the cases of Mississippi, American, and Union, the retention of the taxes by appellants constituted the taking of property without due process of law in violation of [fol. 154] the federal and State Constitutions and holding in the case of DeBardeleben that, while Louisiana had the right to tax such of its property as had a tax situs in Louisiana, the assessment on the proportionate rule basis as made was illegal, null, and void. From the eleven judgments in favor of appellees, both appellants have appealed.

The question common to the various appeals is whether tugboats and barges owned by the different appellees, all non-resident corporations, are taxable in Louisiana as property having a tax situs there.

The record shows that each of the appellees is a corporation chartered under the laws of States other than Louisiana. American, Mississippi, and DeBardeleben are Delaware corporations, and Union is a Pennsylvania corporation. None of the watercraft of American, DeBardeleben,

² Mississippi Valley Barge Line Co. and American Barge Line Co. each are plaintiffs in two suits against the Commissioner of Public Finance for the City of New Orleans and in two suits against the State Tax Collector for the City of New Orleans. The DeBardeleben Coal Corp. is plaintiff in two suits against the Commissioner of Finance for the City of New Orleans, and the Union Barge Line Corp. is plaintiff in one suit against that Commissioner.

or Mississippi was ever physically within the State of Delaware, but some, if not all, of the taxed property of Union was present during the tax year within the State of Pennsylvania. American and Mississippi maintain offices in New Orleans, though their principal business offices are in Louisville and St. Louis, respectively. Union merely employs an agent in New Orleans for the conduct of its business; its principal office is in Pittsburgh. The principal office of the Marine Division of DeBardeleben is in New Orleans; its official home office is in Birmingham, Ala. Each of the four corporations is engaged in transportation of freight upon inland waterways of the United States under authority of a Certificate of Public Necessity and Convenience issued by the Interstate Commerce Commission. [fol. 155] The taxed towboats of American and DeBardeleben are enrolled under United States Shipping Regulations pertaining to vessels engaged in domestic commerce (Title 46, c. 12, U. S. C. A.), at Wilmington, Del., and there, too, they have registered their barges. The towboats of Union are enrolled at Pittsburgh, and the watercraft of Mississippi are enrolled at St. Louis. Under neither Delaware nor Pennsylvania law is the marine equipment of the appellees subject to State taxation.

DeBardeleben operates from New Orleans to Houston, Galveston, and Corpus Christi, in Texas; in Alabama, as far as Mobile; in Florida, to Pensacola, Panama City, and Carrabelle; and in the tax years in question its watercraft made occasional trips up the Mississippi to points north of the Louisiana boundary. The other three operate up and down the Mississippi and its tributaries to points as far north as Minneapolis and east to Pittsburgh. In all trips to Louisiana a tug brings a line of barges to New Orleans, where the barges are left for unloading and reloading and where the tug picks up a loaded line of barges for ports outside Louisiana. These turn-arounds are accomplished as quickly as possible and there is no regular schedule in the sense of a timetable held to. The result is that the tugs and barges are within the boundary of Louisiana only a small portion of the time. Of the total time covered by the interstate commerce operations in 1943, American's towboats spent about 3.8% within the port of New Orleans. In the case of Mississippi for that year, its towboats spent about 17.25%, and its barges about 12.7%; in 1944, its towboats about 10.2%, and its barges about 17.5%. In 1944,

[fol. 156] Union's towboats spent about 2.2% and its barges about 4.3%. Appellees' watercraft, while in the port of New Orleans have the benefit of such fire protection as is afforded all craft moored to the wharves, and of harbor police surveillance, and of all sanitary regulations of the State and City Boards of Health.

DeBardeleben was merged or consolidated in 1937 with W. G. Coyle, Inc., a Louisiana corporation which had operated a Marine Terminal and harbor traffic business within the port of New Orleans. To Coyle's operations in 1934 had been added a common carrier water transportation business, mainly in the Gulf Intracoastal Waterways, running westerly as well as easterly from the port of New Orleans. After the merger in 1937, the Coyle operations were conducted as the Marine Division of DeBardeleben, without interruption or material change, under the name of Coyle Lines. The main office of the Marine Division of DeBardeleben, from which it controlled and carried on continuously all of the Coyle Line operations, was located in New Orleans, and so also was the machine and repair shop, maintained for upkeep and repair of its watercraft. At the New Orleans office the crews of the tugs were regularly paid their wages, and to it the employees reported at the customary taking of the usual 24-hour lay-off at the end of each 6-day work period called for under the union labor contract. At the Coyle New Orleans Terminal, the tugs operated by Coyle Lines were usually fueled, and there, too, as a rule, were made all scheduled general repairs or minor voyage repairs needed by the Marine Division watercraft. None of the Coyle Lines watercraft ever permanently left [fol. 157] the original situs in Louisiana except eight barges especially assigned wholly to hauling company coal on the Warrior River in Alabama.

The court below found from these facts that the tug-boats and barges of American, Mississippi, and Union were never permanently within the State of Louisiana during the tax years, hence had no tax situs in Louisiana and could not be taxed by that State or by the City of New Orleans. With respect to DeBardeleben, it found that New Orleans was the home port of its tugboats and barges, from which they operated; that with the exception of the eight barges in Alabama, its watercraft were never permanently away from that city; hence the tax situs was in Louisiana and the tug-

boats and barges having a tax situs there could be taxed by the City of New Orleans. But the court further found that in assessing the tugboats and barges there had been included in the assessment the eight barges permanently located in Alabama, and that such fact made the city tax against De-Bardeleben illegal, null, and void. The correctness of these rulings with respect to the several companies is the sole question before us.

The Louisiana statutes under which the State and the City of New Orleans taxed the tugboats and barges of appellees are set out in a footnote.³

³ Act 152 of 1932 provides:

"* * * the rolling stock or movable property of any railroad company, telegraph company, canal company or other transportation company, whose line lies partly within this State and partly within another State, or States; or whose sleeping cars run over any line lying partly within this State or partly within another State or States, shall be assessed in this State in the ratio which the number of miles of the line within the State has to the total number of miles of the entire lines."

Act 152 of 1932 was amended by Act 59 of 1944. It provides:

"‘Movable Personal Property’—All movable and regularly moved locomotives, cars, vehicles, craft, barges, boats and similar things, which have not the character of immovables by their nature or by the disposition of law, either owned or leased for a definite and specific term stated and operated (such, illustratively but not exclusively, as the engines, cars and all rolling stock of railroads; the boats, barges and other water craft and floating equipment of water transportation lines);

"(f) The ‘movable personal property’ of such persons, firms, or corporations, whose line, route, or system is partly within this State and partly within another state or states, shall be by the Commission valued for the purposes of taxation and by it assessed;

"1. The portion of all of such property of such person, firm or corporation shall be assessed in the State of Louisi-

Appellants contend that for the watercraft of American, Mississippi, and Union, New Orleans is the terminus into and out of which those lines haul the greater part of the freight handled by them; that the watercraft were loading and unloading in New Orleans throughout the tax years; and that in-fact they were within the State of Louisiana more than in any other State. Appellants insist that under the doctrine of *Pullman's Palace Car Co. v. Penna.*, 41 U. S. 18, Louisiana has the right to tax the craft in question, upon the theory that they have an average continuous presence in Louisiana, the basis of assessment of each appellee being the ratio between the total number of miles of appellee's line in Louisiana and the total number of miles of the entire line. With respect to DeBardeleben, appellants contend that New Orleans, being the home port of its watercraft, was also its permanent tax situs; and that the failure and refusal of that corporation to give the information asked for or to make any assessment return for the tax years involved estopped it to contest the correctness of the assessment made against it. Each of the [fol. 159]. appellees asserts that, the State of its domicile being elsewhere, it is liable to assessment in Louisiana only upon a showing that the watercraft had a permanent situs within the State during the tax years; and that no such showing was made. DeBardeleben further asserts that the lower court was right in setting aside the assessment made against it upon finding that the value of eight barges in Alabama had been included in the total value from which the local assessments were made.

As stated, the City of New Orleans and the State of Louisiana rely chiefly upon *Pullman's Palace Car Co. v. Penna, supra*, as authority for the assessment against appellees. In that case the Supreme Court held that where tangible personal property such as freight and passenger cars are used daily by a railroad over fixed routes in interstate commerce, a State through which the railroad operates although not the State of its domicile may tax such tangible property upon the basis of the ratio between the

ana, wheresoever, in the ratio which the number of miles of the line, within the State bears to the total number of miles of the entire line, route or system, here and elsewhere, over which such movable personal property is so operated or so used by such person, firm or corporation."

mileage within the State and the total mileage of the railroad system. But so far as we have been able to find this principle of apportionment has never been applied to watercraft using the high seas or navigable inland waterways. Under the decisions the regular or irregular stops at ports in nondomiciliary States of watercraft moving in interstate commerce do not establish tax situs in such States, and such watercraft remain taxable only by the State of the owner's domicile. *Hays v. Pacific Mail S. S. Co.*, 17 How. 596; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 Wall. 471; *Ayer & Lord Tie Co. v. Kentucky*, 202 [fol. 460] U. S. 409; *So. Pacific Co. v. Kentucky*, 222 U. S. 63; cf. *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292. Neither enrollment of a vessel at a particular port, even though the vessel makes regular calls at the port of enrollment, *St. Louis v. Wiggins Ferry Co.*, *supra*; *Ayer & Lord Tie Co. v. Kentucky*, *supra* nor benefits received at a port, such as fire protection and wharves for loading and unloading accorded to every vessel, of themselves confer the power to tax upon the State of the port. *Hays v. Pacific Mail S. S. Co.*, *supra*; *So. Pacific Co. v. Kentucky*, *supra*.

The fact that none of the watercraft owned by American, Mississippi, and DeBardeleben has been within the State of Delaware, the State of the owners' domicile, does not of itself control the right of that State to tax the property. Tangible personal property which has not acquired a tax situs elsewhere may be taxed by the State of the owner's domicile although it has never been brought within that State's boundaries. *So. Pacific Co. v. Kentucky*, *supra*. That no tax has been assessed by the State of the owner's domicile has no bearing upon the right of another State to tax. It is only when the tangible personal property has acquired a tax situs within a State other than the owner's domicile that it may be taxed there. *Brown v. Houston*, 114 U. S. 622; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299.

Applying these legal principles to the facts of this case, we are of the opinion that the court below was correct in holding that the tugboats and barges of Mississippi, American, and Union acquired no tax situs in Louisiana, and [fol. 161] that no tax could be legally assessed and collected by that State or by the City of New Orleans. We are also of the opinion that the Court below was correct in holding that the tugboats and barges of DeBardeleben, except the

eight barges in Alabama, had acquired a tax situs in Louisiana. New Orleans clearly was the home port of DeBardeleben's watercraft. Its watercraft, except the eight barges in Alabama, were properly taxed there. The fact that the amount assessed against DeBardeleben was arrived at by including the value of the eight barges in Alabama is not ground for declaring the assessment against that company void. The taxpayer was called upon to furnish information and make its rendition for each of the tax years. Taking the position that it owed no tax, it refused to furnish any information and thus forced the taxing authority to get its information as best it could. Under the local law, if the taxpayer does not make a return, the taxing authority "shall himself fill out said list from the best information he can obtain." The DeBardeleben Coal Corporation was assessed 25% of the value of its tugs and barges. It urges that this was an excessive assessment, arbitrarily made without information either as to the miles it operated within the State in carrying on its business or as to the value of its properties. The evidence indicates that the taxing authority had little information upon which to act and that the assessments were made from estimates based on meagre and uncertain data. This was due in a large measure to DeBardeleben's refusal to furnish requested information. Instead of acting arbitrarily, the taxing authority obviously made the assessments from the best information it could obtain.

[fol. 162] The City of New Orleans has pleaded that the taxpayer, under Act 39 of 1922, is estopped to contest the correctness of the assessments because of its failure to make tax renditions on or before June 1 of the tax years. Construing a similar Act, the Supreme Court of Louisiana has held that the estoppel is not applicable where, as here, taxpayer's failure to file a rendition was based on the honest belief that its property was not taxable. *Travelers' Insurance Co. v. Board of Assessors, et al.*, 122 La. 129, 47 So. 439, 441, citing *Central of Georgia Ry. v. Wright*, 207 U. S. 127.

In decreeing the assessments against DeBardeleben void, the court below erred. The erroneous inclusion of property in an assessment is ground for reduction, not cancellation. *Griggsby Construction Co. v. Freeman*, 108 La. 435, 32 So. 399. The DeBardeleben suits in effect are suits for can-

cession, not reduction of the assessments, and, though under Louisiana practice reduction, in the absence of an alternative plea therefor, may not be decreed in a suit for cancellation, *Fidelity Mutual Life Insurance Co. v. Fitzpatrick*, 125 La. 976, 52 So. 118, 120, a more liberal rule is followed in the federal courts Under Rule 54. (e), Federal Rules of Civil Procedure, relief to which a taxpayer is entitled may be granted even though not demanded. The DeBardeleben suits will, therefore, be remanded in order that the court below may ascertain from the present record, or that record supplemented by additional evidence, whether DeBardeleben has paid excess taxes for the ~~two~~ years, and, if it has, under Act 330 of 1938, order a refund of the excess paid, with interest:

[fol. 163] The judgments appealed from are affirmed in all these causes except No. 12,116 and No. 12,124; in those two causes the judgments appealed from are reversed, and the causes are remanded for further proceedings not inconsistent with this opinion.

[fol. 164]

JUDGMENT

Extract from the Minutes of March 5, 1948

No. 12116

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.

versus

DEBARDELEBEN COAL CORPORATION

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, DeBardeleben Coal Corporation, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 164a]

JUDGMENT

Extract from the Minutes of March 5, 1948

No. 12124

LIONEL G. ORR, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, DeBardeleben Coal Corporation, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 165] ORDER EXTENDING TIME TO FILE PETITION FOR REHEARING

Extract from the Minutes of March 22, 1948

No. 12116

LIONEL G. ORR, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

It is hereby ordered that DeBardeleben Coal Corporation, appellee herein be, and it is hereby granted until April 5, 1948, for the purpose of filing an application for rehearing herein and a written brief in support thereof.

Shreveport, La., this 22 day of March, 1948.

(Signed) Elmo P. Lee, U. S. Circuit Judge.

[fol. 165a] ORDER EXTENDING TIME TO FILE PETITION FOR
REHEARING

Extract from the Minutes of March 22, 1948

No. 12124

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

It is hereby ordered that DeBardeleben Coal Corporation, appellee herein be, and it is hereby granted until April 5, 1948, for the purpose of filing an application for rehearing herein and a written brief in support thereof.

Shreveport, La., this 22 day of March, 1948.

(Signed) Elmo P. Lee, U. S. Circuit Judge.

[fol. 170]

ORDER DENYING REHEARINGS

Extract from the Minutes of April 13, 1948.

No. 12116

LIONEL G. ORR, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

No. 12124

LIONEL G. ORR, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

It is ordered by the Court that the petitions for rehearing
filed in these causes be, and they are hereby denied.

Clerk's Certificate to foregoing transcript omitted in
printing.

(6418)